

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
PETITION FOR
REHEARING
EN BANC**

ORIGINAL

77-1268

Rec'd
11/15/77
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In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

v.

ALLAN SONNENSCHIN,

Defendant-Appellant.

*On Appeal From the United States District Court For the
Southern District*

PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

IRVING ANOLIK
Attorney for Defendant-Appellant
Allan Sonnenschein
225 Broadway
New York, New York 10007
(212) 732-3050

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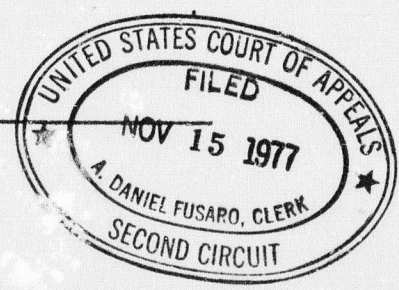


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Docket No. 77-1268
-----x

UNITED STATES OF AMERICA,

Appellee,

-against-

ALLAN SONNENSCHN, E

Defendant-Appellant.

-----x
PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

TO THE HONORABLE CIRCUIT JUDGES LUMBARD, FEINBERG and
VAN GRAAFEILAND:

The petitioner, ALLAN SONNENSCHN, respectfully requests this Court, and this Panel in particular, to grant a rehearing with respect to its decision and opinion of November 2, 1977, wherein it affirmed his conviction for conspiracy to distribute a controlled substance in violation of 18 U.S.C. §846, after trial before Coettel, D.J., and a jury.

The defendant-appellant, petitioner herein, incorporates by reference the briefs filed upon the original appeal herein.

For the sake of orienting the Court, however, we wish to remind this Panel that the defendant had been tried twice, the first trial having ended in a hung jury as to both counts of the indictment and, in the instant trial, the jury having hung upon the substantive count only.

The petitioner herein, a young man, married and a father, had suffered the removal of about 80% of his stomach because of prior surgery.

During his first trial, Stephen Laifer, Esq., represented him and, at his second trial, the same attorney, Laifer, started the litigation by representing him during the opening and the examination and cross-examination of the first, but very essential witness, Leslie Triffleman.

Laifer had made arrangements previously to the trial, to take a vacation in Bermuda, and his schedule required that he discontinue the trial after the conclusion of the examination and cross-examination of Miss Triffelman, because otherwise his vacation plans would be placed in disarray.

Prior to his departure, however, in the presence of Judge Goettel, Laifer asserted that one David Jacobs, Esq., would be prepared to proceed with the trial and would be available for that purpose.

The petitioner stated he had no objection to this arrangement and it is submitted that the petitioner was unquestionably confident that Mr. Jacobs was ready, willing and able to proceed with the rest of the case.

It is at this juncture that the extraordinary circumstances of this case come to life. It is submitted, however, that the very fact that the trial attorney, Stephen Laifer, was permitted to depart for Bermuda during the middle of the case, was in itself plain error which should have motivated this Court to reverse under any circumstances. (Rule 52, F.R.Cr.P.)

REASONS FOR GRANTING
A REHEARING

1. When David Jacobs, Esq. appeared in Court the next business day following the departure of Mr. Laifer for Bermuda, the defendant-appellant, petitioner herein, was obviously thunderstruck and dumbfounded by what occurred.

Notwithstanding this Court's observation that defendant had consented to the departure of Mr. Laifer, and despite the assertion on Slip page 200, that Jacobs was "experienced and thoroughly familiar with the case", the contrary appears in the record. Mr. Jacobs declared to the Court, when he appeared, that he "was totally at a loss and totally unprepared." He stated to the Court, moreover, that "I have never felt in seven years of criminal trial practice, [so] totally at a loss and totally unprepared."

"...It wasn't until last night, after court concluded, that I learned, quite to my amazement and surprise, that Mr. Laifer had proceeded to the point where he actually cross-examined a major Government witness, had opened to the jury and made promises, I'm told, to the jury as to what he was going to affirmatively prove, and I at this point, this morning, don't know one scintilla of what Mr. Laifer said in his opening, what Ms. Triffleman said under direct or under cross-examination, and I feel now, as I have never felt in seven years of criminal-trial practice, totally at a loss and totally unprepared." (179-180)*

*Numerals in parentheses refer to pages of the court reporter's minutes of trial.

At pages 193 and 194, Mr. Jacobs further declared to the Court that he was at a total loss to properly protect Mr. Sonnenschein, saying, inter alia:

"...And I think it will become more apparent as we progress that it is an unsatisfactory relationship at best my coming in at this stage and attempting to salvage something that Mr. Laifer has already begun but abandoned in midstream."

Jacobs asked for a continuance because he felt incapable of properly representing the defendant-appellant. The Court responded that it would not grant a continuance, but added the following:

"THE COURT: Continuance nothing. The defendant is quite clear that he wants you trying the case. I think Laifer abandoned his client to go off on a vacation, but the client was in favor of that. Then with the continuance you are still stuck with what Laifer has done to date.

MR. JACOBS: I might say on that latest ground, during the lunch hour Mr. Sonnenschein, requested permission to speak to you alone.

THE COURT: I know.

MR. JACOBS: He advised me that he was advised by your Honor's secretary that that could not be done unless there was previous permission given by Mr. Duhamel and myself to that arrangement.

I don't know what the defendant wants to speak to your Honor about. I have difficulty in relating to the defendant. He is like a loose horse, to use the phrase, and I have no objection to him speaking to your Honor.

I think that he is going to object at this point to my continuing as his counsel on the grounds that I am ill-prepared or not adequately apprised of what preceded my entry into this case this morning. I suspect that is his motive and I think it is going to be more apparent as we progress that he may have well been right, that it is inuring to his ill benefit, or it is damaging to him beyond any repair to have to continue with an attorney unaware of a lot of things that happened in the case prior to his entry into it.

THE COURT: Well are you a partner in the firm?

MR. JACOBS: Not at all, your Honor. I am very loosely associated with that firm.

THE COURT: If this were a simple case, I would be very apprehensive that it was going to result in a malpractice suit against the firm. Maybe it can still result in a malpractice suit. I know it will very likely result in a habeas corpus or, more accurately, a 2255 being pursued on the basis of inadequate representation.

However, that is an extremely difficult case to make out when you've got retained counsel, which is what we have here.

I appreciate the problem you are in. I think the partners of your firm should appreciate the problem they are creating. But I can't do anything about it."

From the opinion written by this Panel, it appears that its decision to affirm rested, to a significant extent, upon its finding that the petitioner expressly approved of the substitution of the second lawyer.

In other words, it is apparent that this Tribunal found that there had been a waiver of the right to proceed with Mr. Laifer's services and had been an acquiescence and acceptance of the substitution of Mr. Laifer by Mr. Jacobs.

It is submitted, however, that the record does not support this conclusion.

A waiver, to be valid, must be "an intentional relinquishment or abandonment of a known right or privilege." (JOHNSON v. ZERBST, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 146 A.L.R. 357. See also, VON MOLTKE v. GILLIES, 332 U.S. 708, 724, 68 S.Ct. 316, 323).

In the case of UNITED STATES v. PLATTNER, (2 Cir. 1964), 330 F.2d 271, 276, this Court declared that there must be a record sufficient to establish to our satisfaction that the defendant "knows what he is doing and his choice is made with eyes open." (See SCHNECKLOTH v. BUSTAMONTE, 412 U.S. 218).

What occurred herein was the same as would occur where a last-minute, or belated, appointment of counsel occurred. (MATHIS v. RUNDLE, 3 Cir. 1968, 394 F.2d 748, 753; NEWBERRY v. WINCO, 6 Cir. 1971, 449 F.2d 344; WARE v. COX, D.C. Va. 1971, 324 F.Supp. 568; UNITED STATES v. BARBER, D.C. Neb. 1968, 291 F.Supp. 38, 42; cf. MIRANDA v. ARIZONA, 384 U.S. 436, 10 A.L.R.3d 974).

During the argument of the original appeal herein, and subsequent to the argument when the Government supplied certain additional minutes, it appeared that both Laifer and Jacobs had a colloquy with the District Judge prior to the trial, at a point in time when the defendant-appellant was absent, and there was a discussion concerning the expectation that Mr. Jacobs would be handling the case.

It is not disputed that the defendant-appellant himself would not have been disappointed had Jacobs commenced the case and been prepared to see it to a finish.

What happened at the trial itself, however, is totally and completely different than what was represented to Judge Goettel.

Perhaps this Court might presume that Jacobs was trying to hoodwink the Court, or trying in some manner to inject error into the case against the possibility of an appeal.

We deal with this supposition by challenging the Government to impute or establish that such was the motive.

If such were indeed the motive, it would be grounds for the disbarment of such an attorney and it would show an utter disregard and a complete disrespect for the entire criminal justice system and for the Courts.

Any attorney who would do such a thing, we submit, would ipso facto be an inadequate attorney and would, in essence, be an attorney in name only.

The District Judge apparently did not believe that this had occurred because he himself concluded that there had been an abandonment of petitioner by Mr. Laifer.

The District Judge, moreover, declared that the actions which had taken place were apparently malpractice. The Trial Judge, in fact, prognosticated that what had occurred would "very likely result in a habeas corpus or, more accurately, a 2255 being pursued on the basis of inadequate representation."

The Court added, however, "This is an extremely difficult case to make out when you've got retained counsel, which is what we have here."

It is in this aspect of the case that in our main brief upon the original appeal, we asked this Court to distinguish the cases which this Circuit has previously adhered to, namely that the test of inadequate retained counsel is that such counsel must in fact conduct the case as a "farce and mockery", otherwise the allegation of inadequacy will not stand. (UNITED STATES v. WIGHT, 176 F.2d 376, 379 (2 Cir. 1949), cert. denied 338 U.S. 950. See dissent of Judge Oakes in RICKENBACKER v. WARDEN, 2 Cir. 1976, 550 F.2d 62, 68. See also, UNITED STATES v. DE COSTER, 487 F.2d 1201).

2. This Court did not come to grips with the argument advanced on the original appeal as to whether or not the substitution of counsel herein was in essence a deprivation of counsel altogether. The record must be viewed in the light of what Mr. Jacobs actually told the Court, as we have previously indicated.

Jacobs categorically asserted, as an attorney and officer of the Court, that he was totally

unprepared and that in all his years of practice he had never been at such a loss or so unprepared to try a case. This may have flown in the face of the colloquy a number of days earlier with the District Judge, wherein he indicated that he would be prepared to go ahead with the case. The fact remains, however, that Jacobs, on a number of occasions, apparently had substantial conflicts with the defendant, and he even referred to the defendant as a "loose boss", that he had a great difficulty relating to Sonnenschein, and accused Laifer of having "abandoned his client in midstream."

All of these allegations by Jacobs, the attorney that suddenly came into the case in "midstream", are totally at war with this Court's observation that he was experienced and "thoroughly familiar with the case" (Page 200, Slip Opinion of the case at bar).

Is there any question in this Court's mind but that Sonnenschein would not have consented to the substitution of Mr. Jacobs in the middle of the trial for Mr. Laifer, if he had known in advance what Mr. Jacobs would say when he came to Court, namely that he was totally unprepared to proceed. We submit that the only possible answer to that is in the negative.

Since we have already established that the leading cases on waiver of counsel require that a defendant act with his eyes open and with full knowledge of what he is doing and of the consequences of his act, we submit that upon those tests Sonnenschein could not have intelligently and knowingly waived the presence of Laifer.

We submit that this Court needs no argument to convince it that the principles of *FARETTA v. CALIFORNIA*, 422 U.S. 806 are not applicable herein, since defendant was not seeking to represent himself. On the contrary, Sonnenschein obviously needed and wanted counsel. He was entitled, however, to counsel that was capable and, in fact, functioning in a capable manner during the trial.

See *BRUBAKER v. DICKSON*, 310 F.2d 30, 37, where the Court noted:

"Due process does not require 'errorless counsel *** but counsel reasonably likely to render and rendering reasonably effective assistance.'" (Emphasis ours).
Cf. *UNITED STATES v. HANDY*, 203 F.2d 407; 23 C.J.S. Criminal Law §982(8).

Furthermore, there was no waiver of counsel herein (*MAYNARD v. MEACHUM*, 1 Cir. 1976, 545 F.2d 273).

This Court apparently is of the opinion that the defendant waived the presence of Mr. Laifer and, to that extent, he waived counsel.

We submit that the defendant-appellant was not a lawyer, was not a well man, in the sense that he had had major surgery performed on his stomach, and had never been in trouble with the law before. Any waiver, therefore, of the presence of his retained lawyer, Mr. Laifer, would necessarily be predicated upon Sonnenschein's belief and expectation that Mr. Jacobs would come into the case fully prepared and ready to proceed at the point where Laifer had left off. When Jacobs announced, in open Court and on the record, that the contrary was true, and that it was so true, unfortunately, that he was totally unprepared to proceed, it is obvious that at that juncture the Court should not have permitted the case to go forward, but should have granted a mistrial in the Court's own discretion, under the doctrine of manifest necessity, or should have granted a continuance, as Mr. Jacobs requested, until the return of Mr. Laifer, which apparently would have been only a matter of a few days.

We respectfully submit that we heartily agree with this Court's observation that the Trial Judge should not have permitted Mr. Laifer to depart, but, having done so, it was the Court, as much as anyone else, who contributed to the error here.

This Tribunal apparently places the blame upon a hapless defendant who, for the first time in his life, finds himself on trial for a major felony, and is made the pawn of two lawyers who apparently are not seeing eye to eye about what is to be done with him.

This Court seems to completely absolve any responsibility from the shoulders of the Trial Judge.

Having recognized, and we submit correctly, that the Trial Judge erred in permitting Laifer to depart, we maintain that this Court should then go forward and grant a remedy to the defendant for what the Trial Court itself declared was malpractice, and abandonment of a client, and so forth.

We therefore maintain that this case urgently cries out for a rehearing and for a remedy that will enable the defendant-appellant herein to obtain a fair trial and his day in court, with adequate counsel present.

Upon rehearing, we ask this Court to vacate the conviction and to grant a new trial.

3. We also respectfully submit this Court's observation that Jacobs "thereafter . . . adequately represented appellant", is not justified by the record.

While the record may disclose that Jacobs asked questions, on a number of occasions he had side bars with the Court, indicating problems he was having because of the fact that the first counsel, Mr. Laifer, had "opened certain doors"; that he was not conversant with the opening remarks of Mr. Laifer, and that he was unprepared for the case in general.

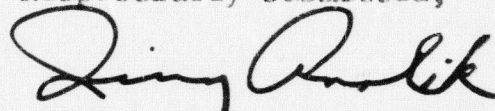
We return to our previous argument, that this is the same as has been condemned in other cases, where counsel is appointed the last minute without adequate preparation. In those cases, a lawyer may indeed be a good lawyer, but unless he has adequate preparation and is ready to handle the case, there is not sufficient and adequate representation by counsel as to satisfy the requirements of the rules or of due process of law.

We also repeat and reallege the other points raised upon the original appeal.

PETITION FOR REHEARING
EN BANC

In the event this Panel of the Court adheres to its original determination, or after granting a rehearing does not disturb its original determination, we respectfully request that this matter be referred to all the active Judges of the Circuit for a determination en banc.

Respectfully submitted,

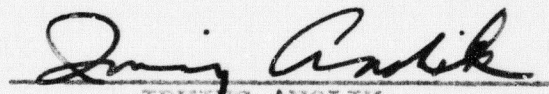


IRVING ANOLIK,
Attorney for Defendant-Appellant
ALLAN SONNENSCHETN.

CERTIFICATION

I, IRVING ANOLIK, a member of the bar of this Court, certify that this petition for rehearing is submitted in good faith and not for the purpose of delay.

DATED: November 9, 1977.


IRVING ANOLIK

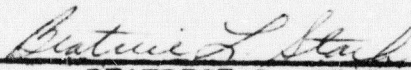
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STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

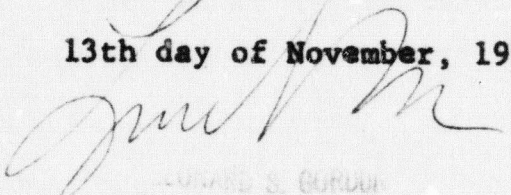
BEATRICE L. STARK, being sworn, says:

I am not a party to this action; I am over 18 years of age; I reside at Queens, N.Y.

On November 13, 1977, I served the within Petition for Rehearing, etc., upon United States Attorney for the Southern District of New York, the attorney for Appellee in this action, at One St. Andrew's Plaza, New York, New York 10007, the address designated by said attorney for that purpose, by depositing a true copy of same enclosed in a postpaid, properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.


BEATRICE L. STARK

Sworn to before me this
13th day of November, 1977.


NOTARY PUBLIC, STATE OF NEW YORK
NO. 24-1512100
Qualified in Kings County
Commission Expires March 30, 1982

